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IN THE

Supreme Court of the United States

October Term, 1951

No. 689

In the Matter

—*of*—

THE DAUNT CORPORATION,

Bankrupt.

LOUIS S. WEINER,

Petitioner,

—against—

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Louis S. Weiner, as trustee in bankruptcy of the Daunt Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on November 7, 1951.

Opinions Below

The memorandum opinion of the referee in bankruptcy (R. 154-170) is not reported. The District Court rendered

no opinion. The opinion of the Court of Appeals (R.) is reported in 192 F. 2nd 760.

Jurisdiction

The judgment of the Court of Appeals was entered November 7, 1951. By order of Mr. Justice Jackson, dated February 4, 1952, the time to file this petition for certiorari was extended to April 5, 1952. The jurisdiction of this Court is invoked under Title 11, United States Code, Section 47(c) and Title 28, United States Code, Section (1).

Statutes Involved

The pertinent statutory provisions are printed in the Appendix to this petition, *infra*, pp.

Questions Presented

(a) Whether a chattel mortgage on property located in New York, executed and filed in accordance with New York statute, and there valid as against third parties, is valid as against the mortgagor's trustee in bankruptcy, after the property had been removed to New Jersey, with the mortgagee's knowledge and consent, the New York mortgage not having been recorded in New Jersey, in any form, and New Jersey having no statute providing for recordation of a foreign chattel mortgage?

(b) Whether the Court below correctly found and applied the applicable New Jersey law?

(c) Whether sound policy and the equities of the situation require that the New York mortgagee prevail over the mortgagor's trustee in bankruptcy, in the circumstances

above stated in (a), where the trustee represents creditors who extended credit to the mortgagor in New Jersey.

Statement

In April, 1946, The Daunt Corporation (hereinafter referred to as Daunt), manufacturer of lighting equipment and having its office and principal place of business in New York, gave to Reconstruction Finance Corporation (hereinafter referred to as RFC) a chattel mortgage on all of its equipment and other personal property in New York. This chattel mortgage was duly filed in accordance with New York laws (R. 56, 57; 95, 96). Thereafter, in 1946 and 1947, Daunt gave to RFC supplemental mortgages on newly acquired equipment and other personalty. These mortgages were also duly filed pursuant to New York laws (R. 57-59; 96-98).

In March, 1948, Daunt acquired from RFC land and buildings in New Jersey and between May 15, 1948, and September 1, 1948, it moved from New York into these buildings its office, place of business and all the personal property then covered by the aforementioned original and supplemental RFC mortgages executed and filed in New York. This removal from New York to New Jersey was made with RFC's knowledge and consent (R. 60, 61; 99, 100).

The New York mortgages were never recorded in New Jersey, in any form. However, on November 22, 1948, Daunt gave to RFC a supplemental chattel mortgage upon all of its personalty then located in New Jersey, after its removal from New York, and which was covered by the New York mortgages. This supplemental mortgage was duly recorded in New Jersey on November 22, 1948 (R. 62, 101).

During the period from May 15, 1948, when Daunt began moving, from New York to New Jersey, its property which was subject to the New York mortgages, to November 22, 1948, when the New Jersey mortgage was executed and filed, Daunt incurred debts and obligations which were and remained unpaid at the time of the institution of the instant proceeding and for which claims had been filed therein (R. 79-81; 130-132).

November 24, 1948, Daunt filed in the United States District Court for the Southern District of New York a petition for arrangement under Chapter XI of the Bankruptcy Act. As debtor-in-possession, it continued operation of its business until June 15, 1949, when, in default of filing a required indemnity bond, it was adjudicated bankrupt. Petitioner was appointed receiver (R. 53, 54) and later, trustee of the bankrupt estate (R. 92, 93).

By petition and order to show cause, petitioner brought two successive proceedings before the referee for the annulment of the New York chattel mortgages upon Daunt's property which had been removed from New York to New Jersey with RFC's knowledge and consent, and which had been in New Jersey at the time of the filing of Daunt's petition for arrangement (R. 46-70; 85-119). RFC filed answers to the petitions denying material allegations, admitting others and pleading affirmative defenses that the petitions fail to state claims upon which relief can be granted (R. 73-78, 82-83; 121-129, 133-134). In consonance with its affirmative defenses, RFC made application for the dismissal of the petitions for insufficiency to state valid claims. The two proceedings were submitted together, on the pleadings, the facts alleged in the petitions, and as above in part recited, being admitted for that purpose (R. 154, 155, 143).

The referee held that: the law of New Jersey applies, but the precise question in issue has not been passed upon by a New Jersey court (R. 165); in the majority of other states the courts have held that a mortgage lien on chattels removed from one state to another with the knowledge and consent of the mortgagee is not enforceable in the second state against the mortgagor's innocent purchasers, encumbrancers or judgment creditors (R. 165, 166); this rule is to be distinguished from a contra minority rule, where the mortgaged chattels are moved to the second state without the mortgagee's knowledge or consent (R. 168); the equities of the situation are against the mortgagee who permits removal of the chattels into the second state, to the injury of innocent parties there (R. 167, 168). So holding, the referee denied RFC's application to dismiss the petitions, as a matter of law, dismissed its affirmative defenses (R. 169) and made an order to that effect (R. 172-182). On RFC's petition for review of the referee's order (R. 184-194), the District Court affirmed without opinion and made an order of affirmance (R. 202-212).

On appeal, the Court of Appeals reversed the order of the District Court and directed dismissal of the petitions (R.). It denied the existence of the majority rule mentioned by the referee, denied that the equities of the situation are as the referee found and held that: the mortgagee's interest is divested, after removal of the chattel with his consent, by an attachment or execution of the mortgagor's creditor, only if a statute of the second state so provides; there is no statute in New Jersey which provides for recording of or which invalidates foreign chattel mortgages and New Jersey cases express a policy favoring recognition of foreign chattel mortgages as against New Jersey purchasers and creditors (R.); courts of other states are in accord with this New Jersey policy (R.).

Specification of Errors

The Court of Appeals erred:

1. In holding that a chattel mortgage lien, valid in the state where the mortgaged property was originally located, will lose its priority over attaching creditors in another state to which the property is removed with the mortgagee's knowledge and consent, only if a statute of the other state so provides.

2. In accepting as controlling New Jersey cases not decided by the highest court of that state and which, in any event, do not expressly pass upon the question whether the fact of the mortgagee's consent to the removal of the chattels into New Jersey is material to the issue of recognition of the New York mortgages as against the mortgagor's attaching creditors.

3. In refusing to follow and adopt the policy of a large number of decisions in courts other than New Jersey refusing recognition of foreign chattel mortgages, as against local attaching creditors and other third parties dealing with the mortgagor, where the mortaged property is removed with the knowledge and consent of the mortgagee, irrespective of the non-existence in the second state of a statute providing for recording of or invalidating foreign mortgages.

Reasons for Granting the Writ

1. The questions involved in this case are of vital importance to Government Agencies and private financial institutions lending capital to industrial enterprises on the

security of chattel mortgages which cover machinery, equipment, motor vehicles and a vast variety of other instruments of modern manufacture, commerce and business, as well as consumer goods. The removal of such mortgaged property from one state to another is a common practice, particularly where the two states are adjoining, as are New York and New Jersey. Free and unhindered removal from one state to another is undoubtedly of benefit to lender and borrower alike. Free and unhindered removal, without due regard for the interests of third parties dealing with the borrower in the second state without knowledge of the liens of foreign mortgages, is definitely an evil. The desired protection of lenders' security clashes with the traditionally abhorrent secret lien. Such conflict of interests should be resolved and the pertinent rights and duties defined whenever occasion arises, particularly where the federal rights of a trustee in bankruptcy intervene, he having a status of an attaching creditor (11 U. S. C., Sect. 110(c), Appendix), and where an authoritative definition of rights and duties becomes important to the administration of bankrupt estates. The Court of Appeals recognized the importance of the case and of the questions presented for decision by granting leave to C. I. T. Financial Corporation, one of the larger financial institutions in the country, to file a brief as *amicus curiae*. The questions presented for decision here are very likely to arise with frequency and while this Court cannot settle the applicable law for the entire country, a definitive pronouncement of the pertinent rules of conflict of laws, as between New York and New Jersey, is urgently needed and desired.

2. The decision of the court below is believed to be erroneous. New Jersey law concededly governing, the Court of Appeals cited four New Jersey cases. *Parr* v. *Brady*, 37 N. J. L. 201; *Mygirack* v. *Lepore*, 6 N. J. Super.

505, 69 A. 2nd 772; *Marvin Safe Co.* v. *Norton,* 48 N. J. L. 410, 7 A. 418; *Lane* v. *J. E. Roach's Banda Mexicana Co.,* 78 N. J. Eq. 439, 79 A. 365. None of these are decisions of the highest court of New Jersey and for this reason they do not settle New Jersey law and policy for the Federal courts in New York. Neither do they furnish conclusive basis upon which the Federal courts may surmise, were surmise proper, what the highest court of New Jersey would say New Jersey law and policy are. In none of these cases did the court consider and expressly pass upon the question whether the fact of the mortgagee's consent to the removal would be decisive of or have a bearing upon recognition of a chattel mortgage executed and valid in the original state. In *Parr* v. *Brady,* the removal was without the mortgagee's consent. In *Mygirack* v. *Lepore,* there is no indication whether the removal was with the mortgagee's consent. In *Lane* v. *J. E. Roache's etc.,* only a transitory, not permanent, removal was contemplated by the mortgagee, but such a removal does not bar recognition of the foreign mortgage. *Bankers' Finance Corp.* v. *Locke etc.,* 170 Tenn. 28, 91 S. W. 2nd 297, 299.

In the absence of controlling New Jersey authority, which the court below evidently recognized, the court was free, if indeed it was not required, to state expressly what it considered to be sound policy and the equities of the situation. This it did not do. It quoted with approval *Goodrich on Conflict of Laws,* where no New Jersey cases are cited (R.), and the American Law Institute's *Restatement of Conflict of Laws* (R.). These opinions, to be sure, deserve consideration but their weight should be measured only by the extent to which court decisions support them. And the Court of Appeals did cite five cases from states other than New Jersey. These, however, do not furnish any conclusive support either to

the text, the Restatement, or the decision. Thus, *Smith* v. *Brooks*, 47 N. W. 2nd 389, 154 Neb. 93, accorded a Kansas mortgage priority over the lien of an attaching creditor in Nebraska only because the attaching creditor was a resident of Kansas, where he entered into the contract which gave rise to the later attachment, and he had constructive notice of the chattel mortgage filed in Kansas, prior to the removal of the res into Nebraska. Furthermore, the mortgagee's consent to the removal was limited to and conditioned upon the sale of the mortgaged res in Nebraska by the mortgagor, the proceeds to be remitted to the mortgagee, the mortgagor acting as agent for the mortgagee. Neither of these two distinguishing factors are present in the case at bar and a proper reading of the opinion will show that Nebraska does not repudiate the general rule of refusing to recognize a foreign chattel mortgage upon removal of the res into Nebraska with the mortgagee's knowledge and consent. *Goetschius* v. *Brighton*, 245 N. Y. 186, 192, 156 N. E. 660, leaves open the question here in issue and in *Farnham* v. *Eichler*, 230 App. Div. 639, 246 N. Y. S. 133, it does not clearly appear that the removal was with the consent of the mortgagee. New York law is altogether unsettled and the two New York cases cannot be said to support the judgment below. See *New York Annotations to Restatement of Conflict of Laws*, Sections 268-275. *Shapard* v. *Hynes*, 8 Cir., 104 F. 449, 52 L. R. A. 675, applying Indian Territory law to recognize the priority of a Texas mortgage over a local attaching creditor, appears to support the judgment below but, as pointed out by the Delaware Court in *Morris Plan Bank etc.* v. *Terrell*, 69 A. 2nd 452, 453, "it is one of the few cases which extends the result to cases where the first mortgagee either knew of or consented to the removal." The result in *Cobb* v. *Buswell* (1864), 37 Vt. 337, also appears to sustain the judgment

below, but who can say with any assurance that the Vermont court of last resort today would follow a decision rendered during the Civil War?—and even if it would, the removal in the *Cobb* case, with the mortgagee's consent, from New Hampshire to Vermont, was not a permanent removal, an operative fact requiring recognition of the foreign mortgage even in Tennessee where prevails the majority rule referred to by the referee. *Bankers' Finance Corp.* v. *Locke etc.*, 170 Tenn. 28, 91 S. W. 2nd 297, 299.

Opposed to these inconclusive decisions of courts from states other than New Jersey are many cases, in addition to those cited by the referee (R. 166, 167), holding, upon sound reason and generally entrenched policy against secret liens, that where mortgaged chattels are removed from the original to a second state, with the knowledge and consent of the mortgagee, the mortgage lien is not given priority and recognition over the mortgagor's innocent purchasers and attaching creditors, even though in the second state there is no statute for recording of or invalidating foreign mortgages. *Hess-Harrington, Inc.* v. *State Exchange Bank etc.* (Sup. Ct., Kansas), 122 P. 2nd 739; *Hart* v. *Oliver Farm Equipment Sales Co.* (Sup. Ct., N. M.), 21 P. 2nd 96; *Morris Plan Bank etc.* v. *Terrell* (Superior Ct., Del.), 62 A. 2nd 452; *Bank of Atlanta* v. *Fretz*, 148 Tex. 551, 226 S. W. 2nd 843; *United Construction Co.* v. *Milam* (C. C. A. 6), 124 F. 2nd 670; *Robbins* v. *Bostian* (C. C. A. 8), 138 F. 2nd 622; *Bankers' Finance Corp.* v. *Locke etc.*, 170 Tenn. 28, 91 S. W. 2nd 297; *Bank of California* v. *American Fruit Growers, Inc.* (D. C. Wash.), 41 F. Supp. 967.

3. Clearly the decision below is in conflict with all the foregoing cases, including the two cases from the Sixth and Eighth Circuits, on the issue of policy and equities of the situation. There is no question but that there is con-

siderable difference of opinion and much confusion in the cases as to what the policy and equities of the situation should be where comity and desired protection of valid liens, as an encouragement to financing, conflict with innocent third parties dealing with the mortgagor in the second state, ignorant of the secret liens upon the mortgagor's property. New Jersey is not alone in absence of authoritative decisions by the highest court of the state. As heretofore pointed out, New York law is entirely unsettled. There is a real and substantial necessity for the settlement by this Court of what it conceives to be the better policy and equities of the situation, for adoption by lower Federal courts in proper cases and for guidance to state courts in this important field of the conflict of laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

April 3, 1952.

Respectfully submitted,

I. H. WACHTEL,
Counsel for Petitioner.

APPENDIX

Statutes Involved

Title 11, United States Code, Section 110(c), as amended March 18, 1950.

> "* * * The trustee, as to all property of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists."

New Jersey Revised Statutes, Title 46, Chapter 28, Section 5.

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation, made and subscribed by the holder of such mortgage, his agent or attorney, stating the consideration of such mortgage and, as nearly as possible, the amount due and to become due thereon, be recorded by section 46:28—7 of this title."

New Jersey Revised Statutes, Title 46, Chapter 28, Section 7.

> "Every instrument mentioned in section 46:28-5 of this title shall be recorded, in suitable books provided for that purpose, in the office of the county recording officer of the county where the property so mortgaged shall be at the time of the execution of such instrument; * * *."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 689

LOUIS S. WEINER, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the referee in bankruptcy and of the District Court for the Southern District of New York (R. 52-61; 68-71) are not reported. The opinion of the Court of Appeals for the Second Circuit (R. 79-85) is reported at 192 F. 2d 760.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1951 (R. 86-87). On February 4, 1952, Mr. Justice

Jackson extended the time for filing a petition for certiorari to and including April 5, 1952 (R. 89). The petition was filed on April 5, 1952. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly interpreted New Jersey law in refusing to nullify certain New York chattel mortgages, where the property covered by those mortgages was removed to New Jersey with the mortgagee's consent and where the mortgagee did not re-file the mortgages in New Jersey, there being no statute in that state authorizing recordation of foreign chattel mortgages.

STATUTE INVOLVED

The only statute in New Jersey authorizing recordation of chattel mortgages (New Jersey Statutes Annotated, Title 46, Chapter 28, Sections 5 and 7) provides in pertinent part:

> Sec. 5. "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers

and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation, made and subscribed by the holder of such mortgage, his agent or attorney, stating the consideration of such mortgage and, as nearly as possible, the amount due and to become due thereon, be recorded by section 46:28-7 of this title."

Sec. 7. "Every instrument mentioned in section 46:28-5 of this title shall be recorded, in suitable books provided for that purpose, in the office of the county recording officer of the county where the property so mortgaged shall be at the time of the execution of such instrument; * * * ."

STATEMENT

This action arises out of an attempt by petitioner, as trustee in bankruptcy of the Daunt Corporation, to set aside certain chattel mortgages given by the bankrupt to respondent to secure a loan.

On April 1, 1946, respondent loaned $50,000 to the Daunt Corporation, which executed and delivered to respondent on the same day a chattel mortgage as security for the loan (R. 7). At that time Daunt had its principal place of business in Brooklyn, New York and the mortgage covered all

of its fixtures, machinery and equipment there located (R. 19). This mortgage was filed and recorded in Brooklyn on the same day it was executed. (R. 19). Later in 1946 and in 1947, Daunt gave respondent supplemental chattel mortgages on additional machinery and equipment it acquired in Brooklyn and in Queens County, New York (R. 20). These supplemental mortgages were also promptly filed for record in the appropriate New York counties[1] (R. 20).

Between May and September, 1948, and after purchasing a factory in Trenton, New Jersey, Daunt, with respondent's knowledge and consent, removed all of its fixtures, machinery and equipment to that city (R. 20-21, 54). The New York chattel mortgages, covering this property, were not re-recorded in New Jersey (R. 21). On November 22, 1948, however, Daunt gave respondent an additional chattel mortgage on all of its personal property in New Jersey (R. 21). This mortgage was recorded in New Jersey on Novem-

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[1] The execution date and the date and place of filing of these supplemental mortgages are shown by the following schedule:

Date of Execution	Date of Filing	County of Filing
June 6, 1946	June 11, 1946	Kings
Aug. 9, 1946	Aug. 9, 1946	Kings
Jan. 30, 1947	Feb. 4, 1947	Kings
	Feb. 4, 1947	Queens
May 28, 1947	June 4, 1947	Kings
	June 4, 1947	Queens

ber 22, 1948, and covered the same property which had been removed from New York and which was already covered by the New York mortgages (R. 21).

On November 24, 1948, Daunt filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York (R. 52). It was allowed to operate its business under court order as a debtor in possession until June 15, 1949, when the petition for arrangement was dismissed and Daunt was adjudged a bankrupt (R. 52-53).

Petitioner, the trustee in bankruptcy for Daunt, then moved for an order declaring the chattel mortgages held by respondent null and void as against the bankrupt's estate (R. 31-40). Respondent's motion to dismiss for failure to state a claim on which relief could be granted was denied by the referee in bankruptcy, who ruled that respondent's failure to refile the New York mortgages in New Jersey invalidated them as to the trustee in bankruptcy (R. 56).[2] The referee's action was affirmed by the district court (R. 68-71).

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[2] The referee and both courts below did not rule on the effect of the New Jersey mortgage of November 22, 1948, which had been attacked as an attempted preference "in violation of Section 60a and b of the Bankruptcy Act." (R. 37). No question concerning that mortgage is raised by petitioner here.

On appeal, the court below ruled that respondent's consent to the removal of the property to New Jersey did not impair the validity of the New York mortgages and that their validity would be "recognized under New Jersey law." (R. 85). It accordingly reversed the district court judgment with directions to dismiss the trustee's motion to set aside the mortgages (R. 86).

ARGUMENT

The only issue in this case is whether the court below correctly held that the lien of a chattel mortgage properly recorded according to the laws of New York, where it was executed and where the property was then located, is not lost by removal of the property to New Jersey with the mortgagee's consent. Petitioner recognizes that New Jersey law is controlling and that the holding of the court below was based on New Jersey law (Pet. 7).[3] But he seeks review here on the ground that the court below misinterpreted New Jersey law and relied on New Jersey cases which were not "decisions of the highest court of New Jersey" (Pet. 8).

The question presented is therefore one of local law having no general importance; the decision of

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[3] Since New Jersey law controls here, petitioner's assertion that the decision below conflicts with *United Const. Co.* v. *Milam*, 124 F. 2d 670 (C.A. 6), which was based on Kentucky law, and with *Robbins* v. *Bostian*, 138 F. 2d 622 (C.A. 8), which was based on Nebraska law, is incorrect.

the court below correctly interpreted the applicable New Jersey law and properly relied on decisions of intermediate courts of that state. Accordingly, further review by this Court is not, we submit, warranted.

1. Under the prevailing rule, as set forth in the Restatement, the chattel mortgagee does not forfeit his lien by consenting to the removal of the property to another state unless that state requires him to re-file the chattel mortgage and he fails to do so. Restatement, Conflict of Laws, Section 270; Goodrich, *Handbook of the Conflict of Laws* (2d Ed. 1938), pp. 418, 420. Thus, as observed by the court below, the effect of the removal of the property to New Jersey in this case "depended on the law of the State of New Jersey." (R. 84). The effect of the removal depended, in other words, on whether New Jersey law conditioned the validity of foreign chattel mortgages on re-recordation in New Jersey.

The court below properly found that New Jersey law imposed no such condition. While the New Jersey chattel mortgage recordation statute voids unrecorded mortgages, there is no doubt that it applies only to chattel mortgages executed on property in New Jersey. *Parr* v. *Brady*, 37 N.J.L. 201. The express terms of the statute require recordation of a chattel mortgage in the appropriate New Jersey "county where the property so mortgaged" was located "at the time of

the execution of such instrument." New Jersey Statutes Annotated, Title 46, ch. 28, Sec. 7; *supra*, p. 3. If the property was originally located and mortgaged in another state where the mortgage was properly recorded, "there is no statute in New Jersey" which requires or even authorizes refiling of that mortgage upon removal of the property to New Jersey (R. 84); *Parr* v. *Brady*, 37 N.J.L. 201; *Mygirack* v. *Lepore*, 6 N.J. Sup. 505; see also *Marvin Safe Co.* v. *Norton*, 48 N.J.L. 410; *Lane* v. *J. E. Roach's Banda Mexicana Co.*, 78 N.J. Eq. 439.[4]

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[4] All of the four cited New Jersey cases recognize that removal of the property to New Jersey does not destroy the rights of a chattel mortgagee or conditional vendor. Petitioner attempts to distinguish the *Parr* case on the ground that it involved a removal without the consent of the mortgagee (Pet. 8). No similar distinction is attempted by petitioner with respect to the *Marvin Safe Co.* case, where the facts clearly show that consent was obtained before removal of the property to New Jersey. Moreover, even in the *Parr* case, while the initial removal was made without the mortgagee's consent, the facts show that he later learned of the removal. Knowledge of the removal, as pointed out in one of the cases relied on by petitioner, "is equivalent to consent." *United Const. Co.* v. *Milam*, 124 F. 2d 670, 671 (C.A. 6).

The significant factor here is that since New Jersey law does not permit recordation of foreign chattel mortgages, the mortgagee is unable to record such a mortgage even where he consents to the removal or later learns of it. For that reason, it is "by the better view, immaterial that the mortgaged property has been taken to the second state with the mortgagee's consent" (R. 83); Goodrich, *Handbook of the Conflict of Laws* (2d Ed. 1938) p. 418; Jones, *Chattel Mortgages and Conditional Sale*, (Bowers Ed. 1933), section 260c.

2. Petitioner's other contention is that none of the four cited New Jersey cases "are decisions of the highest court of New Jersey and for this reason" should not have been followed by the court below (Pet 8). It must be noted, however, that two of the cases—the *Parr* and *Marvin Safe Company* cases—are decisions of the New Jersey Supreme Court, which is now the court of last resort in New Jersey. N.J. Constitution, Art. 6, Sec. 2, par. 2. It is true that when the *Parr* and *Marvin Safe Company* cases were handed down, these decisions were subject to review by the New Jersey Court of Errors and Appeals. But even at that time, the Supreme Court was an intermediate appellate court whose decisions, if not overturned by the higher court, were fully binding on all other courts. *Makohon* v. *Millers Nat. Ins. Co.*, 12 N.J. Misc. 282.

The determinations of such an intermediate state court, in the absence of a decision by the highest state court, should be respected by a federal court seeking to apply the law of that state. *Fidelity Trust Co.* v. *Field,* 311 U.S. 169, 177; *West* v. *A. T. & T. Co.,* 311 U.S. 223, 236. The court below properly relied on the decisions of the intermediate New Jersey courts.

CONCLUSION

The decision below is correct and presents no conflict with applicable state law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1952.

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